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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1935

No. 664

J. W. TIPTON,
Petitioner,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),
Respondent.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 78 Fed. (2d) 450. (R. 39.)

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

(a) The judgment of the Circuit Court of Appeals was entered on June 24, 1935. (R. 50.) Appellant's petition for a rehearing therein was denied on October 21, 1935. (R. 51.)

(b) The ruling made in the lower court, relied on as the basis of this court's jurisdiction, is the judgment sustaining respondent's demurrer to appellant's complaint without leave to amend, and dismissing appellant's cause of action. (R. 12.)

(c) The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

(d) This court granted certiorari on February 11, 1936.

STATEMENT OF THE CASE.

The complaint, demanding $40,000.00 damages in an ordinary civil action at law, was filed in the Superior Court, Fresno County, a state court of general jurisdiction of all civil cases at law (Calif. Const. Art. VI, sec. 5), in which the demand amounts to more than $2000.00 (Cal. Stats. 1933, p. 1806, at 1811-1812; C. C. P. §89), and the cause was removed to the United States District Court, Southern District, Northern Division. (R. 10.) The complaint is laid on a breach of the statutory duty imposed by 45 U. S. C. §2 (automatic couplers), as extended by 45 U. S. C. §8, to "any railroad engaged in interstate commerce"; and alleges, in paragraph I,

> "* * * that at all times herein mentioned said defendant corporation was doing business and engaging as a common carrier by railroad in interstate commerce in Fresno County, State of California",

and in paragraph II:

> "That at all times herein mentioned defendant corporation ran and operated a line of railroad over and across the County of Fresno, State of California, and defendant maintained various places of business in said county * * * and that on the tracks of defendant where the accident hereinafter referred to occurred, defendant maintained at all times herein mentioned a highway of interstate commerce."

Paragraphs III and IV allege, in substance, the infliction of injury upon plaintiff, while employed by defendant as a switchman, caused by a defective coupler, in the course of a switching operation on said tracks, at Fresno, Calif., September 21, 1932; paragraphs V and VI set forth the injuries proximately resulting therefrom; and paragraph VII lays an *ad damnum* in the sum of $40,000.00.

The demurrer was general, "that said complaint does not state facts sufficient to constitute a cause of action against this defendant". (R. 8.)

The demurrer was sustained without leave to amend (R. 11), the learned District Judge being of the opinion that plaintiff's exclusive remedy was under the California Workmen's Compensation, Insurance and Safety Act, and that therefore the plaintiff had not stated, and by any amendment could not state, a cause of action for damages.

The clerk entered judgment accordingly. (R. 12.)

The Circuit Court adopted this view and sustained the judgment on the same ground.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in holding that the California Workmen's Compensation Act (a compulsory act) was the sole remedy of the appellant for damages resulting from a violation of the Federal Safety Appliance Act, and in sustaining the demurrer on that ground.

QUESTION PRESENTED.

Did the Circuit Court of Appeals err in deciding—directly contra California court's construction of the California Statutes—in a case removed to the United States District Court in California from a state court on the ground of diversity of citizenship—that a California railroad employee injured due to a violation by his railroad employer of the Federal Safety Appliance Act, on a highway of interstate commerce, while both the employer and employee were engaged in intrastate rather than interstate commerce, had no right to sue for damages and that his sole remedy was to recover compensation under the provisions of the compulsory California Workmen's Compensation Act?

SUMMARY OF ARGUMENT.

The sole question before the court for determination is—whether or not the complaint on file herein, states a cause of action for general damages. The injuries sustained by appellant were directly caused by a

violation by the railroad company of the Federal Safety Appliance Act (45 U. S. C. A. 2) while plaintiff was engaged in intrastate commerce in California on a highway of interstate commerce. It is beyond question that a violation of the duty, thereby created, gives rise to a cause of action in favor of an employee proximately injured thereby. The question for determination, therefore, is the form of remedy afforded the employee for a violation of this duty.

It cannot be gainsaid that the remedy arises either:

1. Under the terms of the Federal Safety Appliance Act, itself; or

2. Under applicable state law.

If the Safety Appliance Act governs the remedy, it is beyond dispute that the complaint states a cause of action.

On the other hand, if the remedy is governed by state law, the California courts have held that the remedy is a civil action for damages under general California statutes, and that the compulsory California Workmen's Compensation Act is not the applicable state statute.

In such event, therefore, the complaint also states a cause of action. Consequently whether the remedy is governed by the terms of the Federal Safety Appliance Act or is governed by the applicable state statute, the complaint on file herein states a cause of action for general damages.

ARGUMENT.

I.

THE FEDERAL SAFETY APPLIANCE ACTS CREATE A RIGHT, WHICH CANNOT BE ABROGATED BY A COMPULSORY STATE WORKMEN'S COMPENSATION ACT.

As heretofore stated, the sole question for determination by this court is whether or not the complaint on file herein states a cause of action for general damages. The injuries sustained by appellant Tipton are alleged in the complaint to have been directly and proximately caused by a defective coupler maintained upon a railroad car by respondent railroad company, contrary to the requirements of the Federal Safety Appliance Act. (45 U. S. C. A. 2.) It has never been questioned, and in fact has frequently been affirmatively determined in decisions of this court and other federal courts as well as state courts, that the Federal Safety Appliance Act imposes a specific duty and obligation upon railroad companies.

It is now beyond dispute that the safety Appliance Acts apply to cars in use on a highway of interstate commerce regardless of the type of commerce (inter or intrastate) in which the cars are being used.

Texas & P. R. Co. v. Rigsby, 241 U. S. 33;
Moore v. C. & O. Ry., 291 U. S. 205;
45 U. S. C. A. §8.

It is also beyond dispute that the duty thus laid upon the railroad gives rise to a correlative *right* in favor of an employee proximately injured by reason of a violation of this duty regardless of the type of

commerce in which the employee was engaged when injured.

Cases supra;

Fairport Ry. v. Meredith, 292 U. S. 589;

U. S. v. California, 56 S. Ct. 421 (Feb. 3, 1936), 80 L. ed. 367.

Since this right is a creation of the federal statute, it must be conceded that, if the remedy is also a creation of the federal statute, no mandatory state Workmen's Compensation Act can destroy either.

Ward v. Erie Ry., 230 N. Y. 230 (certiorari denied 256 U. S. 696) and cases therein cited.

Assuming that the remedy (which is nothing more or less than a cause of action for the violation of the right) afforded, for the violation of the duty, is not a creation of federal law, but has been left to the states, the question still remains as to whether or not the state can *abrogate* the right of action given by the common law by adopting a compulsory compensation act.

From the decision of this court in *Texas & Pac. Ry. v. Rigsby,* 241 U. S. 33, to the decisions of this court during the 1933 October term hereinafter referred to, it was the almost unanimous opinion of the bar and of the federal and state bench that the *right and the remedy were* creations of the federal statute. The arguments proving the basic soundness of this position and the reasons therefor, are set forth in the *Rigsby* case, supra, and are clearly expressed in the majority opinion of the Court of Appeals of New York in *Ward v. Erie Ry.,* supra, as follows:

"The plaintiff has a remedy under (the Safety Appliance) act, unless the Workmen's Compensation Act of New York (Consol. Laws, c. 67) has taken it away from him. The defendant concedes that this could not be done if the remedy as well as the right was the creation of the federal statute. The argument is, however, that all that Congress did was to clothe the employee with a right and the carrier with a duty, leaving the remedy, in case of infringement, to the law of the locality. It is a rule of the common law that a member of the class for whose benefit a statute has been enacted has a right of action against the offender for the damages sustained. Texas & Pac. Ry. Co. v. Rigsby, supra, 241 U. S. at page 39, citing 1 Comyn Dig. Tit. Action upon Statute, F; Martin v. Herzog, 228 N. Y. 164, 168, 126 N. E. 814. The remedy for violation of the federal statute is given, it is said, not by the statute, but by the common law of the locality, and what the locality has given the locality may change. This argument, rejected by the trial court, was sustained at the Appellate Division, and the complaint dismissed.

We reach a different conclusion. We find the inference irresistible that the plaintiff's remedy, like his right, has a statutory origin. That was the ruling of the Circuit Court of Appeals for the Seventh Circuit in Ross v. Schooley, 257 Fed. 290, 168 C. C. A. 374, certiorari denied, 249 U. S. 615, 39 Sup. Ct. 390, 63 L. Ed. 803, where the same question was presented. We may assume that, if the purpose of the statute was merely to impose a duty, without creating or preserving a right of action for the damages, the states could abrogate the right of action that would attach at

common law. Whether the assumption is a sound one, we need not now determine. If the purpose was, however, not merely to impose a duty, but also to create or preserve a right of action for the damages, the right of action so established is immune from impairment except by act of Congress. N. Y. Central R. R. Co. v. Winfield; So. Pac. Ct. v. Jensen; Knickerbocker Ice Co. v. Stewart, supra. The creation or preservation of a remedy may, of course, result from implication as well as from express words, if the intention is apparent. Smith v. Alabama, 124 U. S. 465. The question is simply one of statutory construction—of the purpose of the lawmakers.

Here there are two provisions that unmistakably reveal the purpose to give to the right of action for damages then attaching at common law a statutory confirmation and a statutory sanction. The act provides (27 Stat. 532, Act March 2, 1893, ch. 196, §8) that any employee injured by any locomotive, car, or train in use contrary to the statute 'shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge'. This provision assumes the existence of a remedy and limits the available defenses. The regulation of the remedy is equivalent to a declaration that a remedy there shall be. The states were without power, with that statute on the books, to make assumption of risk through continuance in employment an answer to a suit. Congress did not mean that they should have the power to destroy the right of action which they were powerless to impair. The supplementary act of 1910 (36 Stat.

L. 299) reinforces this conclusion. It provides that the penalty of $100 for each violation of its provisions shall not be construed 'to relieve such carrier from liability in any remedial action for the death or injury of any railway employee'. The Supreme Court, referring to these two provisions in Texas & Pac. Ry. Co. v. Rigsby, supra, at page 40 of 241 U. S., said of them that 'the inference of a private right of action' was thereby 'rendered irresistible'.

We build the right of action on the statute. We look to the common law in determining the implications of the statute, the things assumed and held for granted. Murray v. Chicago & N. W. Ry. Co. (C. C.), 62 Fed. 24, 31. That is the background in which its language finds a setting. Congress knew the ancient rule which gives a remedy in these circumstances for violation of a duty. With that knowledge, it left to allusion and suggestion the things that allusion and suggestion were sufficient to supply. The only question is whether it left the gaps so wide that in the process of filling them interpretation fades into conjecture. We think our reading of the act is not subject to that reproach. The Statute in scheme and framework is instinct with plan and purpose to maintain a remedy and fortify it. The will of Congress is expressed in abbreviated signs and symbols, but none the less it is expressed. Enough is there to forbid the imputation of a willingness that an act, described in its title as one to promote the safety of employees and travelers, should be dependent for its efficacy upon the pleasure of the states. It is written there in substance: Any one for whose benefit this statute is enacted shall have, in case of viola-

tion, a right of action for his damages, and it shall no longer be a defense that there was service with knowledge of the risk."

This view has been followed in the following cases involving compulsory compensation acts:

McMahon v. Montour R. Co., 270 U. S. 628, reversing 128 Atl. 918;

Ross v. Schooley, 257 Fed. 290 (C. C. A. 7), certiorari denied, 249 U. S. 615;

Ward v. Erie R. Co., 230 N. Y. 230, 129 N. E. 886, certiorari denied, 256 U. S. 696;

Geraghty v. Lehigh Valley Ry., 70 Fed. (2d) 300, 11 Fed. Supp. 378;

Leuthe v. Erie Ry., 12 Fed. Supp. 161;

Miller v. Reading Co., 292 Pa. 44, 140 Atl. 618;

Kenna v. Calumet, H. & S. E. R. Co., 284 Ill. 301, 120 N. E. 259, 262-3;

Flanigan v. Hines, 108 Kan. 133, 193 Pac. 1077, 1080-1;

Kraemer v. Chicago & N. W. R. Co., 148 Minn. 310, 181 N. W. 847;

Southern Pac. v. Henderson, 208 S. W. 561 (Tex.).

The foregoing cases deal with compulsory workmen's compensation laws of Illinois (*Ross v. Schooley; Kenna v. Calumet, H. & S. E. R. Co.*), New York (*Ward v. Erie R. Co.; Geraghty v. Lehigh Valley Ry.*, and *Leuthe v. Erie Ry.*), California (*Southern Pac. v. Henderson*), Pennsylvania (*McMahon v. Montour R. Co.; Miller v. Reading Co.*), Minnesota (*Kraemer v.*

Chicago & N. W. R. Co.), and Kansas (*Flanigan v. Hines*).

The case of *McMahon v. Montour R. Co.*, supra, is an authority squarely in point in favor of appellant. There the plaintiff railroad employee brought an action to recover for personal injuries, relying upon the Safety Appliance acts; he was not engaged in interstate commerce at the moment of injury; the state court denied him a right of recovery, saying *inter alia:*

> "The state of Pennsylvania has made ample provision for employees, who are injured in the course of their employment, in what is known as the Workmen's Compensation Act; to the tribunal provided in that statute the plaintiff in this case has recourse, and, in our opinion, to it alone." (283 Pa. 274, 128 Atl. 918.)
>
> "The Supreme Court of the United States granted a writ of certiorari (268 U. S. 686) and thereafter, on submission of the cause, reversed the judgment of the State Court in a memorandum opinion, saying:
>
> 'Per Curiam: Reversed with costs, upon the authority of Southern R. Co. v. United States, 222 U. S. 20; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 37.' " (270 U. S. 628.)

In *Ross v. Schooley,* supra, the Circuit Court of Appeals, Seventh Circuit, speaking through Circuit Judge Baker, said:

> "Inasmuch as the Congress has created the liability for damages for injury or death resulting from violation of the Safety Appliance Act, no

state Legislature can alter or impair the federal right by passing compensation acts.

It is immaterial whether the injured employe was at the moment engaged in interstate or intrastate commerce, because the congressional power that was called into play was the power to prescribe the equipment of interstate carriers for the protection of all persons upon such roads, both employes and travelers, regardless of their participation in interstate commerce. A state Legislature, therefore, has no more power to curtail the federal right of an employe than of a traveler.

What effect a state compensation law has upon the right under the Safety Appliance Act of an employe, who was injured through defective appliances while coupling intrastate cars on an interstate railroad, has not been directly involved in any case in the Supreme Court cited by counsel or found by us. But our conclusion, which rejects a result that would make the operativeness of the act dependent upon the legislative wills of the several states, and which aligns that act with the Employers' Liability Act in substantive and procedural effect, is supported by our understanding of Schlemmer v. Buffalo, etc. Ry. Co., 205 U. S. 1; St. Louis, etc. Ry. Co. v. Taylor, 210 U. S. 281; Delk v. St. Louis, etc. Ry. Co., 220 U. S. 580; North Carolina Ry. Co. v. Zachary, 232 U. S. 248; Southern Ry. Co. v. R. R. Com. Ind., 236 U. S. 439; Texas etc. Ry. Co. v. Rigsby, 241 U. S. 33; New York, etc. Ry. Co. v. Winfield, 244 U. S. 147."

In *Miller v. Reading Co.*, supra, the Supreme Court of Pennsylvania said:

"The argument is made that, though the Workmen's Compensation Law is inapplicable to a case falling within the scope of the Federal Employers' Liability Law, because then interstate commerce is involved, yet the same is not true where the accident occurs in an intrastate movement, for in such instances the local legislation must fix the relative rights of the master and servant. Congress has seen fit to provide that certain appliances shall be used by railroads engaged in business between the States, or connected with others furnishing such service, and, for the protection of all, the performance of certain duties is made requisite. Recovery may be had by employees, irrespective of the character of their work at the particular moment of injury, when there has been a violation of the requirements as to the use of safety appliances. These rights of the one injured are not affected by the Workmen's Compensation Act, for the same underlying reasons which led to the conclusion that the Federal Employers' Liability Act may notwithstanding be enforced.

McMahon v. Montour R. R. Co., supra.

Attention has been called to a decision in which a contrary view is expressed (D. L. & W. R. R. Co. v. Peck (C. C. A.), 225 F. 261), but a different conclusion was reached in Ross v. Schooley (C. C. A.), 257 F. 290, certiorari denied 249 U. S. 615, 29 S. Ct. 390, 63 L. Ed. 803. In the latter case it was said: (quotation) * * *.

Later (Director General v. Ronald (C. C. A.), 265 F. 138), Judge Manton, who took part in the Peck Case first cited, declared:

'Bound as we are by the pronouncement there (in the Ross case) and the reasons therefor, as

expressed by the Supreme Court (Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874), and more recently adhered to by the denial of the writ in the Ross Case, I conclude that plaintiff below may recover here, irrespective of his engagement in interstate commerce. * * * Liability is expressed and fixed by the statute itself, and is to be found therein. The federal act takes precedence over the state Workmen's Compensation Act.'

Appellant further argues that all power to sue for injury to an employee, except when engaged in interstate commerce, has been taken from our courts, and jurisdiction of all claims for losses sustained conferred on the Compensation Board. Therefore it is insisted that, though a right of action may exist, where there has been a violation of the Safety Appliance Act by one engaged solely in intrastate commerce, yet the state courts have no power to entertain such claims, and any permissible suit must be instituted in some federal tribunal. The act of Congress gave to the employee rights not granted under state laws and our courts have frequently sustained proceedings based on the federal statute in question (Sims v. P. R. R. Co., supra, and cases there cited), and the exercise of this jurisdiction has been approved on appeal to the United States Supreme Court. McMahon v. Montour R. R. Co., supra; Pursglove v. Ry., 285 Pac. 27, 131 A. 477, certiorari denied 270 U. S. 654, 46 S. Ct. 352, 70 L. Ed. 783.

The enforcement of claims arising under the Safety Appliance Act, in personal injury actions is not confined to the federal tribunals. The state courts must always hold themselves open for the

prosecution of civil rights growing out of the laws of the United States. 2 Roberts Federal Liability of Carriers, §877; Claflin v. Houseman, 93 U. S. 130, 23 L. Ed. 833; Murray v. N. W. R. Co. (C. C.), 62 F. 24; Langhill v. P. R. R. Co., 254 Pa. 119, 98 A. 783. Our Workmen's Compensation Act gave to a board exclusive jurisdiction of proceedings to adjudicate claims of employees, which, by consent, express or implied, it was agreed should be so disposed of, and, as to such cases, jurisdiction of the courts to try and determine is ousted. But as to demands not arising from the ordinary relation of employer and employee, such as the enforcement of rights fixed by federal statute, their powers remain as if no such state legislation was in force. It follows that there was power below to entertain the present holding."

That the view hereinbefore set forth has been universally adopted and that the rule so laid down has become a settled principle of law, upon which rights have rested for many many years, is shown by the great body of reported cases that have followed the theory of the *Rigsby* case.

San Antonio Ry. v. Wagner, 241 U. S. 476 at 480;

Penn. R. R. v. Logansport, 29 Fed. (2d) (C. C. A. 7, Ind.);

Detroit Ry. v. Cravens, 13 Fed. (2d) 352 (C. C. A. 6, Mich.);

Devine v. B. & O. R. R., 253 Fed. 948 (C. C. A. 3, Penn.);

Dedinger v. Penn. R. R., 39 Fed. (2d) 799 (C. C. A. 6, Ohio);

St. Louis R. R. v. Smith, 254 Fed. 581 (C. C. A. 5, Tex.);
Tyon v. Wabash Ry., 207 Mo. App. 337;
Carey v. N. Y. Central, 250 N. Y. 345;
Ewing v. Coal & Coke Ry., 82 W. Va. 433;
St. Louis & S. F. R. R. v. Barron, 166 Ark. 647;
Grew v. Boston Ry., 83 N. H. 385;
Sims v Penn. R. R., 279 Pa. 114;
Anderson v. C. & O. Ry., 352 Ill. 561 (cert. den. 290 U. S. 675).

No decision save the one now under review before this court has held that a compulsory Workmen's Compensation Act is the sole remedy of an employee injured by reason of a violation of the Safety Appliance Acts or indeed that the *right and remedy* is *not* created by that act. The cases decided by this court in the October term 1933 *do not so hold.* Those cases will be discussed in order inverse to the dates of their decision.

In *Fairport Ry. v. Meredith,* 292 U. S. 589, this court was called upon to decide whether or not the absolute duty, imposed by the Safety Appliance Acts with regard to power brakes, extended to a traveler on the highway. Although the purpose to protect travelers was not expressed in the act, the court found it present and held that the duty extends to and includes travelers at railway-highway crossings. The court stated:

> "Sections 1 and 9 of the Safety Appliance Act convert this qualified duty imposed by the common law into an absolute duty, from the violation of which *there arises a liability for an injury result-*

ing therefrom to any person falling within the terms and intent of the act."

This court in the same case further held that the question of the defense of contributory negligence did not involve a federal question. In so holding this court said:

> "The Federal Safety Appliance Act as we already have said and this court repeatedly has ruled, imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of the common law."

This holding followed the decision of this court in *Minneapolis & St. P. R. Co. v. Popplar,* 237 U. S. 369, decided just *before* the *Rigsby* case.

In *Gilvary v. Cuyahoga Valley R. Co.,* 292 U. S. 57, injuries were caused by a violation of the Safety Appliance Act with no interstate commerce involved. Ohio, where the injury occurred, had a compensation act with special provisions as to injuries on railroads. The act had no application where there was interstate commerce. Where intrastate commerce was present, the act applied only, if prior to the accident, both parties *elected* to accept the provisions of the act and the election was approved by the Industrial Commission of Ohio. The only question before this court for decision was whether or not this agreement was repugnant to the provisions of the Safety Appliance Act. (*Leuthe v. Erie R. Co.,* 12 F. Sup. 161.)

We have carefully examined the briefs on file in the *Gilvary* case and find that *counsel for both sides* contended that a right of action for violation of the Safety Appliance Act in favor of one injured, even though he be engaged in intrastate commerce, is created *by the terms of the act itself.* (See Brief on Behalf of Respondent, pages 20, 21, 26 and 27; *Gilvary v. Ry.*, October term 1933, No. 575.)

Counsel for respondent therein admitted the existence of the right of action and contended that it could be *waived by contract.* This court accepted the Ohio court's construction of the Ohio statute and held that the election thereunder was binding.

In *Moore v. Chesapeake & Ohio Ry.*, 291 U. S. 205, plaintiff, a resident of Indiana had sued the defendant corporation, a resident of Virginia, in the Federal District Court in Indiana. The complaint contained two counts: one charged a violation of the Federal Employers' Liability Act (45 U. S. C. A. 51) while plaintiff was engaged in interstate commerce and a violation of the duty imposed by the Safety Appliance Act; the second alleged a violation of the Employers' Liability Act of Kentucky, where the cause of action arose, and a violation of the Safety Act. Pleas in abatement were overruled by the District Court and sustained by the Circuit Court. The Kentucky statute reproduced the provisions of the Federal Employers' Liability Act and the Kentucky legislature read into its local statute the provisions of the Safety Appliance Act. This court held that the first cause of action was properly brought in Indiana. It then held that the

second cause of action was one for a violation of the state act. Since the state statute incorporated the Safety Appliance Act, and, since there was nothing in the federal statute which precluded a state incorporating it, the plaintiff charged a violation *of the state statute*. That the federal right might have been coextensive makes no difference. Thus, since Federal jurisdiction depended solely on diversity of citizenship, the action was properly brought in Indiana. Thus, this case *affirms* a right of action for a violation of the Safety Appliance Act.

Coming back then to our original proposition, we find that no case has held that the *right* arising from a violation of the Safety Appliance Act, can be destroyed by a compulsory compensation act or that the *right and remedy* is not a creation of the federal act. The rule of the *Rigsby* case in this regard has been followed for many years and it should be followed now.

Assuming that the *right* is a creation of the federal statute and that *the remedy* for violation of the right springs from the common law of the states, we come to the question of how far the states can abrogate the right.

It is important to consider that the compensation given under a compulsory Workmen's Compensation Act *is not damages for violation of a right*. It is compensation arising because of a *status* and has nothing to do with *a violation of a duty*.

In *Kenna v. Calumet H. & S. E. R. Co.*, 284 Ill. 301, the court said:

"It is argued that the Workmen's Compensation Act does not conflict with or abrogate any of the provisions of the Safety Appliance Act, but only changes the remedy. The Safety Appliance Act by irresistible inference, as held by the Supreme Court of the United States, confers a private right of action for the death or injury of an employee caused by a violation of its terms. This right of action was to recover compensatory damages for the loss suffered. The Workmen's Compensation Act would take away this right of action and confer instead a right to a sum fixed by statute without regard to the damages in the particular cases except by reference to the wages which the employe was then earning in his particular employment. *The Workmen's Compensation Act substitutes, not a different remedy for the employe, but a different thing for him to recover.*"

In *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, the Supreme Court of California said:

"There is a manifest difference between a compulsory act, like ours, and elective acts, like the Roseberry Act of 1911 (St. 1911, p. 796) and various statutes in other states, under which the compensation provisions are dependent upon the election or consent of the employer and employe. It may well be said that the rights declared by an elective statute have their origin and sanction in the agreement of the parties to be bound by the statute. Under a compulsory statute, however, the correlative rights and obligations are not founded upon contract. *Nor do they correspond with the legal conception of a tort, since a liability is imposed without regard to the element of wrong*

doing on the part of the persons charged. The obligation is to be defined as a statutory one, attached by law to a given status."

In *Alaska Packers Assn. v. Industrial Acct. Com.*, 294 U. S. 532, this court, in discussing the Workmen's Compensation Act of the State of California, spoke as follows:

> *"The liability under workmen's compensation acts is not for a tort. It is imposed as an incident of the employment relationship, as a cost to be borne by the business enterprise, rather than as an attempt to extend redress for the wrongful act of the employer."*

The *"right"* created by the federal statute exists only in so far as it can be enforced by *action. There is no right as distinguished from the right to enforce the liability for the breach of duty.* As the courts have stated, the creation of the duty by Congress gave rise to a correlative *right* and that right can only be a right to recover damages. Regardless of how far the states can *regulate* the particular remedy for a violation of that right, they cannot destroy the right by refusing *any* remedy, any more than they could make "assumption of risk" a defense. This, a compulsory compensation act purports to do, and this, it cannot do.

Consequently whether the *right and remedy* are creations of the federal act, or only the *right* is a creation of the federal act, in neither event, can the right be destroyed by a compulsory compensation act. Therefore, assuming the California act, by its terms

does apply, still the complaint in this action states a cause of action for compensatory damages.

II.

ASSUMING THAT THE EXISTENCE OF ANY REMEDY FOR INJURY, CAUSED BY A VIOLATION OF THE SAFETY APPLIANCE ACTS, IS A MATTER LEFT TO THE STATES AND THAT A STATE CAN ADOPT A COMPULSORY COMPENSATION ACT AND MAKE IT THE SOLE REMEDY, CALIFORNIA, WHERE THE ACCIDENT OCCURRED, HAS NOT DONE THIS.

If the entire matter of the remedy depends on local state law, the problem is to determine that law, and in so doing we look to local court decisions construing state law. This court accepts the meaning and scope given to a state Workmen's Compensation Act by a local state court.

Thornton v. Duffy, 254 U. S. 361;
Burns Mtg. Co. v. Fried, 292 U. S. 487;
Packing Co. v. Parramore, 263 U. S. 418;
Quong Ham Wah v. Corness, 255 U. S. 445.

And see:

Michigan v. Trust Co., 286 U. S. 334;
Express Co. v. Kentucky, 273 U. S. 269;
Smiley v. Kansas, 196 U. S. 447.

Since the Safety Appliance Acts were within the power of Congress to pass, they are part of the law of California to be enforced in its courts.

Claflin v. Hauseman, 93 U. S. 130;
Mondou v. N. Y. Ry., 223 U. S. 1.

Looking then to decisions of the California courts on this precise question, we find that it has there been directly determined.

In *Ballard v. Sacramento Northern Ry.*, 126 Cal. App. 486 (hearing denied by California Supreme Court), Ballard was killed by reason of a defective handbrake maintained by the railroad company on a freight car on a highway of interstate commerce. In answer to the contention that the sole remedy afforded was under the California Workmen's Compensation Act, the court spoke as follows:

> "The contention that the Workmen's Compensation Act applies, we think is without merit. In Smithson etc., v. Atchison, T. & S. F. Ry. Co., 174 Cal. 148 (162 Pac. 111), in speaking of the Federal Employers' Liability Act, which corresponds in force and effect with the Safety Appliance Act, the Supreme Court said, quoting from the syllabus: 'In actions brought in state courts, under the provisions of the Federal Employers' Liability Act approved April 22, 1908, the decisions of the Supreme Court of the United States are controlling in the construction of the act.' Here, jurisdiction to try cases based upon the Federal Safety Appliance Act is vested in district and superior courts. By subdivision 'C' of section 69 of the Workmen's Compensation Act, it is expressly provided that where interstate commerce questions are presented, resort to the courts is not prohibited. We do not need to review the testimony showing that interstate commerce is carried on over the lines of the defendant, further than to state it is sufficient to establish such character,

and the record shows that the defendant practically admitted such character in the trial Court."

In *Walton v. S. P. Co.*, 48 Pac. (2d) 108 (hearing denied by the California Supreme Court August 29, 1935; certiorari denied by this court, December 9, 1935 —*Southern Pac. Co. v. Walton*, October term 1935 No. 548) the identical question presented herein came before the California courts *after the decision in the Moore and Gilvary cases, supra.*

The District Court fully discussed these cases, stated that in an *intrastate* case the state law applied, and then held that the applicable state statute was *not* the Workmen's Compensation Act, but that the remedy was an action for general damages. The court spoke as follows:

"The contention of appellant that the second cause of action is barred by the statute of limitations is untenable. Walton received his injury on March 25, 1930; he died January, 1932. The present action was commenced February 16, 1932, within 45 days after his death. The Boiler Inspection Act is silent as to the time within which an action may be brought, and therefore, under the authorities, about to be referred to, the state law, section 340, subd. 3 of the Code of Civil Procedure, applies, which provides that the action be brought within one year after the death. Moore v. Chesapeake & O. R. Co., 291 U. S. 205, 54 S. Ct. 402, 405, 78 L. Ed. 755 (Feb. 5, 1934). In this case action was brought in two counts: (1) Under Federal Employers' Liability Act; and (2) on the theory that plaintiff was not engaged in

interstate commerce under Safety Appliance Acts and a Kentucky statute. In discussing this subject, the court said:

'In relation to injuries received in that state in intrastate commerce, aside from the particular bearing of the Federal Safety Appliance Acts, the liability of respondent was determined by the laws of Kentucky. * * * Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce, and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this court. * * * The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. * * * But the act made no provision as to the place of suit or the time within which it should be brought, or as to the right to recover, or as to those who should be beneficiaries of recovery, in case of the death of the employee. While dealing with assumption of risk, the statute did not affect the defense of contributory negligence and hence that defense was still available according to the applicable state law. (Citing the Schlemmer (220 U. S. 590, 31 S. Ct. 561, 55 L. Ed. 596) and Popplar (237 U. S. 369, 35 S. Ct. 609, 59 L. Ed. 1000) cases.) In these respects the amended act of 1903 made no change. * * *

The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of

the common law * * * and was left to be enforced accordingly, or, in case of the death of the injured employee, according to the applicable statute. * * * 'The Federal statute, in the present case, touched the duty of the master at a single point, and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state.'

In Gilvary v. Cuyahoga Valley R. Co., 292 U. S. 57, 54 S. Ct. 573, 575, 78 L. Ed. 1123, we find the following: 'Petitioner cites language in Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 41, 36 S. Ct. 482, 60 L. Ed. 874. But that case is not in point on the question under consideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee, through the breach "spring from the principle of the common law" and was left to be enforced accordingly, or in case of death "according to the applicable statute" '—citing Moore v. Chesapeake & O. R. Co., supra; Minneapolis, St. Paul, etc. Ry. Co. v. Popplar, 237 U. S. 369, 35 S. Ct. 609, 59 L. Ed. 1000. 'These acts do not create, prescribe the measure, or govern the enforcement of, the liability arising from the breach.'

As is said in the Gilvary case, supra, with respect to the Safety Acts: 'They do not extend to the field occupied by the State Compensation Act'.

While these decisions dealt with the Safety Appliance Act, it has been held in a case under the Boiler Inspection Act, where similar questions were raised, that the fact it arose under the latter act is 'a distinction involving no different question'. Rice v. Baltimore & O. R. Co. (C. C. A.), 42 F. (2d) 387, 392.

It thus appears that the Boiler Inspection Act does not purport to provide remedial procedure where it is to be invoked as a ground of recovery for death independently of its application with the Liability Act in an interstate case; hence, in an intrastate case such as this, the state law applies. * * *

The appellant's contentions that the sole remedy of an employee of a common carrier, engaged in interstate transportation, or, in this case, of his personal representative, where, at the time of the injury, the employee was not engaged in interstate transportation, but under circumstances where there has been a violation of duty imposed by the Boiler Inspection Act, is under the State Workmen's Compensation Act are untenable. (St. 1917, p. 831, as amended.) The evidence here shows that the accident happened on a highway of interstate commerce. Reporter's transcript, p. 201, line 18; p. 312, lines 12-19; p. 312, lines 22-26; p. 313, lines 1-5.

Under the authority of Ballard v. Sacramento Northern Railway Co., 126 Cal. App. 486, 14 P. (2d) 1045, 15 P. (2d) 793, the instant suit is maintainable."

The petition for hearing by the California Supreme Court in the *Walton* case was filed after the decision

of the Circuit Court in the Tipton case, and the Tipton decision was urged as a reason why the court should grant a hearing.

Thus the California courts, after fully discussing the *Moore* and *Gilvary* cases, have held, in view of Sec. 69c of the California Workmen's Compensation Act and the general nature thereof (see *North Alaska Salmon Co. v. Pillsbury* and *Alaska Packers Assn. v. I. A. C.*, supra) that said compensation act has no application to an injury received on a highway of interstate commerce, by reason of a violation of a Safety Appliance Act. (It is beyond dispute that except for a situation covered by the compensation act the general right of a servant to sue his master for negligence under the common law exists in California. See *Calif. Civil Code* Secs. 1714, 3281, 3333; *Calif. Political Code* Secs. 4468; *Walton v. S. P.*, supra.)

The California District Court of Appeal is created by the Constitution. (Art. VI, Pars. 1, 4a, 4b.) Its decisions are the "law of the case",

United Dredging Co. v. Corniss, 208 Cal. 705;

Deacon v. Bryans, 212 Cal. 87,

and are binding upon appellate, superior and all lower courts.

Skaggs v. Taylor, 77 Cal. App. 519 at 524.

The state Supreme Court, in passing on petitions for hearing, accepts as correct the facts as stated in the opinion of the Appellate Court (*Burke v. Mayes,* 10 Cal. App. 206, 211), opinion of Supreme Court on denial of hearing), and its order denying a hearing

may be taken as an approval of the *conclusion* reached by the District Court.

Eisenberg v. Superior Court, 193 Cal. 575.

And see,

Bridges v. Fisk, 53 Cal. App. 117 at 122;
People v. Whitaker, 68 Cal. App. 7 at 11;
Clover v. Jackson, 81 Cal. App. 55 at 59;
Masonic Mines v. Sup. Ct., 136 Cal. App. 298 at 300.

Thus the *conclusion* in the *Walton* case is that an action for general damages may be brought in the Superior (lower) Court for an injury or death due to a violation of a Safety Appliance Act in intrastate commerce. Two California Appellate Courts and the California Supreme Court have *held* that the Workmen's Compensation Act is not the "applicable state law" in an action of the character here presented but that an action for general damages in the Superior (lower state) Court may be maintained.

In view of the nature of the California procedure, the decision of this court in *Graham v. White-Phillips Co.,* October term 1934, No. 29 (80 L. Ed. Adv. Ops. p. 62) is not in point.

See, also,

Erie Ry. v. Hilt, 247 U. S. 97;
In re Gilligan, 152 Fed. 605 (cert. den. 206 U. S. 563).

The cause now before this court was commenced in the Superior Court of the State of California, and

removed to the federal District Court on the ground of diversity of citizenship. (R. 30.) In such a case the jurisdiction of the federal court is derivative and it sits in lieu of and for the state court.

Lambert Run Coal Co. v. Ry. Co., 258 U. S. 377.

We thus have decisions of the California Supreme Court construing the California statutes and those decisions are binding on this court. (Cases supra.) Section 69c of the California Compensation Act was obviously designed to provide for the situation now before this court and it has been so construed by the California courts.

Therefore, if we adopt the view that we look solely to the "applicable state statute" in testing the sufficiency of the complaint herein, we find that beyond question, it states a cause of action for general damages.

CONCLUSION.

Since on all possible theories the complaint on file herein states a cause of action for general damages, the judgment of the Circuit Court should be reversed, with directions to the lower court to overrule the demurrer on file herein.

Dated, San Francisco, California,
March 11, 1936.

HERMAN A. BACHRACK,
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Of Counsel.

(Appendix Follows.)

Appendix

I.

Safety Appliance Act.

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

(Mar. 2, 1893, c. 196 §2, 27 Stat. 531.)

California Workmen's Compensation Act.

Section 6.

"Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against any employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, in those cases where the following conditions of compensation concur: * * *

b. Where such conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this act, shall be the exclusive remedy against the employer for injury or death. * * *"

Stat. 1929, p. 430.

Section 69.

"c. This act shall not be construed to apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be sub-

ject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the constitution of the United States or the acts of congress."

Section 1714, Civil Code.

Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief.

Section 3281, Civil Code.

Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.

Section 3333, Civil Code.

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Section 4468, Political Code.

The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state.